Section 11 of the Bill of Rights of the Constitution of the State of Kansas provides, in part, as follows:

> "The liberty of the press shall be inviolate: and all persons may freely, speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right; . . ."

It is contended by the defense that the Kansas Statute, on its face and as construed and applied, is unconstitutionally broad and vague, violating the due process and free speech provisions of the federal and state constitutions.

In the opinion of this Court, the statute is adequate. The definition of obscenity generally conforms to the definition adopted by the Supreme Court of the United States. Further, in the case of *State v. A Quantity of Copies of Books* (191 Kan. 13), the Supreme Court of the State of Kansas stated:

> "Turning to the statute (G.S. 1961 Supp. 21-1102a) we readily see that the first section contains a definition of obscenity. We believe that the test for obscenity which is provided is adequate and we are applying it in this case."

It is further contended that the absence in the Statute of a right to a jury trial, and the refusal to grant defendants' request for a jury trial and jury determination of the issue of obscenity, renders the statute unconstitutional on its face and as construed and applied, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution.

The Supreme Court of this State affirmatively held in *State v. A Quantity of Copies of Books* (191 Kan.

13) that there is no right to a jury trial in a case such as the one at bar. This action arises out of a statute. There is no basis for the action at common law.

The Court finds that there was no right to a jury trial in this case.

It is further argued by the defense that the procedure employed by the plaintiff herein is without statutory authority.

By its decision in *A Quantity of Copies of Books et al. v. Kansas* (378 U.S. 205), the Supreme Court of the United States held:

> "A state's seizure of allegedly obscene paperback novels, without a prior adversary determination of their obscenity, and a subsequent court order directing the county sheriff to stand ready to destroy them, are unconstitutional."

The defense argues that plaintiff is attempting, by employing this procedure, to breathe life into a statute which has been declared to be constitutionally deficient.

In the opinion of this Court, the procedure employed in the case provided adequate safeguards against the suppression of non-obscene books. By affording an adversary determination of obscenity prior to seizure, plaintiff has adequately met the requirements imposed by the U. S. Supreme Court in the case of *A Quantity of Copies of Books v. Kansas.*

It is further contended by the defense that the books named in the Information are not obscene.

This Court is bound by the decisions of the Supreme Court of the United States as to what is within the range of permissible publications under the freedom of

the press provisions of the Constitution. We must apply the test of obscenity as set forth by that Court.

The U. S. Supreme Court in the case of *Roth v. United States* and *Alberts v. California* (354 U.S. 476) held:

> "The proper test is whether, to the average person, applying contemporary community standards, the dominant theme of the material in question, when taken as a whole, appeals to prurient interest."

In defining "prurient interest", the Court cites and approves the definition contained in the A.L.I. Model Penal Code:

> "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e. a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ."

The *Roth* decision further quotes the definition of "prurient" contained in Webster's New International Dictionary (Unabridged, 2nd ed., 1949.)

> "Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; or desire, curiosity, or propensity, lewd."

It was further held in *Roth v. United States:*

> "Obscenity is not within the area of consitutionally protected speech or press."
>
> "Sex and obscenity are not synonymous, obscene material being material which deals with sex in a manner appealing to prurient interest."

> "The portrayal of sex in art, literature, and scientific works is not itself sufficient reason to deny the material the constitutional protection of speech and press."
>
> "All ideas having even the slightest social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the constitutional guaranties of free speech and press, unless excludable because they encroach upon the limited area of more important interests."

In the leading case of *Jacobellis v. Ohio* (378 U.S. 184) the Supreme Court of the United States has enlarged upon the standards laid down in the *Roth* case. In this case, the Court stated:

> "It should also be recognized that the *Roth* standard requires in the first instance a finding that the material goes substantially beyond customary limits of candor in description or representation of such matters."

In the case of *Jacobellis v. Ohio* the U. S. Supreme Court further held:

> "The constitutional status of an allegedly obscene work must be determined on the basis of a national standard."
>
> "Obscenity is excluded from constitutional protection only because it is utterly without redeeming social importance."

It is in the light of the foregoing decisions that the Court must determine whether the subject material in this case is obscene.

At the hearing before Judge Sattgast on December 10, 1964, Robert Bruce Cutler testified as an expert witness on behalf of the books named in the Information and Rector's Book Store.

Robert Bruce Cutler is an Associate Professor of English at Wichita State University where he has been employed since 1960. He was a Graduate Teaching Fellow and Instructor in the Department of English at Kansas State University from 1955 to 1960. His educational background includes a Bachelor's Degree from the State University of Iowa; a Master's Degree from Kansas State University; and graduate work at the University of Naples in Italy, where he was a Fullbright student. He is a Phi Beta Kappa, and is a Fellow in the Society for Religion in Higher Education. He spent four years working as a member of the American Friends Service Committee in Central America and in the United States. He has published fiction, poetry and literary criticism. He won the University of Nebraska Press First Book Award in 1960, and won the Kansas City Star Heart of America Poetry Award in 1964. During the past two years he has written book reviews for the Wichita Beacon and for the Kansas City Star.

Professor Cutler has read each of the eleven books named in the Information, and each of the nine books introduced by the defense.

Professor Cutler testified that all of the books named in the Information are novels; that all have discernible plots, motivations and themes; that each book concerns itself with some kind of familiar fictional problem; that in some cases it is a solution of a crime, in some cases it is a problem of marital discord, in some cases it is the adjustment of student or artistic life; that about

one half of each novel concerns itself with this kind of fictional problem; that about one half of each novel concerns itself with erotic events of various kinds.

Professor Cutler further testified that the sexual activity portrayed in the books named in the Information is generally described as sexual foreplay; that the erotic activities described in these books have to do with titilation, with urging of sexual responses, but they do not deal in any graphic or detailed way with the sexual activities although the subjective states of minds of the participants are treated at some length.

Professor Cutler further testified that in each of the books named in the Information, there is no direct reference to the male or female sex organs as such; that the language used in these novels is not offensive to the community; that the strongest expressions used in these novels are "damn" and "hell", and even these are relatively infrequent; that the language used in these novels is not vulgar; that there are no four letter Anglo-Saxon words.

Professor Cutler further characterized the books named in the Information as representative of a stratum of literature that would include such things as mystery stories, sentimental romances, self-confessional literature, all written on a very elementary level geared to individuals who have limited background and ability.

Professor Cutler further testified that each of the books introduced by the defense are in common circulation in the City of Wichita, and in the nation as a whole.

He further testified that six of the books introduced by the defense, *Eternal Fire, City of Night, Lady Chatterley's Lover, The Carpetbaggers, Tropic of Cancer,*

and *My Life and Loves,* are available in the City Library of Wichita, Kansas; that each of the books introduced by the defense are available in other public libraries in the United States; that each of the books introduced by the defense are available for purchase in book stores in Wichita, Kansas.

He further testified that four of the books, *Lady Chatterley's Lover, The Carpetbaggers, Tropic of Cancer,* and *City of Night,* have been on best seller lists published by the New York Times.

Professor Cutler further testified that, in his opinion, none of the books introduced by the defense go beyond the customary limits of candor in the description or representation of sex; that in addition to the nine books introduced by the defense, other books in general circulation in the nation as a whole and in Wichita, Kansas, including *Candy* by Southern and Hoffenberg, *The Group* by McCarthy, *Pretty Leslie* by Cassill, *The Young Lovers* by Halevy, and *Nova Express* by Burroughs, contain graphic descriptions of sexual behavior which exceed in candor sexual descriptions and portrayals found in the books named in the Information; that, in his opinion, none of the latter five books go beyond the customary limits of candor, in the nation as a whole and in Wichita, Kansas, in the portrayal of matters pertaining to sex and sexual behavior.

Professor Cutler further testified that, in his opinion, the books named in the Information are not utterly without social importance; that said books have a social importance which must be understood in the context of the audience for which they are designed; that said books are designed for people of limited back-

ground, who, like a person of more sophisticated background, would likely have interest in erotic experience and who would be able to read them and understand them.

Professor Cutler further testified that, in his opinion, the books named in the Information do not go beyond the customary community standard of common conscience in the Community of Wichita, Kansas, and in the nation as a whole in portraying sex and sexual behavior.

The plaintiff offered no evidence in rebuttal.

This Court concurs generally in the opinions expressed by Professor Cutler.

Three books introduced by the defense have received judicial approval, to-wit: *Lady Chatterley's Lover* (Grove Press, Inc. v. Christenberry, 276 F. 2d 433), *Tropic of Cancer* (Grove Press, Inc. v. Gerstein, 378 U.S. 577), and *Fanny Hill* (Larkin v. G. P. Putnams' Sons, 14 N.Y. 2d 399, 252 N.Y.S. 2d 71, 200 N.E. 2d 760). Each of these three books which have received judicial approval go far beyond any of the books named in the Information in the description or representation of matters pertaining to sex, nudity or excretion.

The Court finds that each of the books introduced by the defense, all in common circulation in Wichita, Kansas and in the nation as a whole, go far beyond any of the books named in the Information in the description or representation of matters pertaining to sex, nudity or excretion.

The Court further finds that, in addition to books introduced by the defense, other books in common cir-

culation in Wichita, Kansas and in the nation as a whole, exceed in candor sexual descriptions and portrayals found in the books named in the Information.

The Court further finds that none of the books named in the Information contain obscene, immoral, lewd or lascivious language or descriptions, manifestly tending to the corruption of the morals of persons.

The Court further finds that none of the books named in the Information go substantially beyond customary limits of candor in description or representation of sex, nudity or excretion.

The Court further finds that to the average person, applying contemporary community standards, the dominant theme of each of the books named in the Information, when taken as a whole does not appeal to prurient interest.

Based upon the evidence, the Court further finds that none of the books named in the Information are utterly without redeeming social importance.

The Court further finds that the books named in the Information are, and each of them is, expression protected by the free speech and press provisions of the Federal and State Constitutions.

The books named in the Information are not what the Court would choose for its own reading, or for reading by its family. In the opinion of the Court, these books are trash. However, the Supreme Court of the United States has held that the dissemination of views may not be suppressed because they are unpopular, annoying or distasteful. Even bad literature is entitled to constitutional protection of freedom of speech and press if it does not meet the legal test of obscenity as defined

by our statutes and the Supreme Court of the United States.

When compared to numerous books in common circulation in Wichita, Kansas, and in the nation as a whole, many available in public libraries and featured on "best seller" lists, the books named in the Information are mild in language and expression.

As stated by Mr. Justice Harlan in the case of *Smith v. California,* 361 U.S. 147, "The community cannot where liberty of speech and press are at issue, condemn that which it generally tolerates".

The book *Tropic of Cancer,* goes far beyond the books in question, contains virtually every filthy word in our language, and portrays sexual activity in the most graphic detail. When this book has been held by the Supreme Court of the United States to be constitutionally protected, this Court cannot condemn the books named in the Information as obscene.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the books named in the Information are found not to be in violation of K.S.A. 21-1102; that plaintiff's prayer for the issuance of a warrant to the Sheriff of Sedgwick County, Kansas is denied; that judgment is hereby entered for defendants and intervenors for costs, effective upon filing of the journal entry.

TOM RAUM
Judge

APPENDIX B.

Opinion and Judgment of the Supreme Court of Kansas.

STATE OF KANSAS, ex rel., ROBERT C. LONDERHOLM, *Appellant* and *Cross-Appellee*, v. A QUANTITY OF COPIES OF BOOKS, *Appellees* and *Cross-Appellants*, FRANCIS G. VATER and JOE RECTOR, JR., Co-partners, doing business as Rector's Book Store, Wichita, Kansas, *Intervenors-Appellees* and *Cross-Appellants*. No. 44,513.

SYLLABUS BY THE COURT

In a proceeding *in rem* for the confiscation of eleven named paperback books, the record of trial is examined and *held:* The trial court did not err in denying a request for jury trial or in overruling a motion to quash the information and to dismiss the proceeding upon constitutional grounds; and *held* further, upon an independent review of the entire record, the trial court erred in its order finding the books not to be obscene and therefore not subject to seizure.

Appeal from Sedgwick district court, division No. 7; TOM RAUM, judge. Opinion filed July 14, 1966. Affirmed in part and reversed in part with directions.

Richard H. Seaton, assistant attorney general, argued the cause, and *Robert C. Londerholm*, attorney general, and *Park McGee*, assistant attorney general, were with him on the briefs for the appellant and cross-appellee.

William I. Robinson, of Wichita, argued the cause, and *Mark H. Adams, Charles E. Jones, J. Ashford Manka, Clifford L. Malone, Mark H. Adams*, II, *John*

S. Seeber, Floyd E. Jensen, Philip L. Bowman, and *Robert Hall,* all of Wichita, were with him on the briefs for the intervenors-appellees and cross-appellants. Of Counsel: *Joe Rolston,* Wichita, *Stanley Fleishman* and *Sam Rosenwein,* Hollywood, California.

The opinion of the court was delivered by

HARMAN, C.: At issue here is the liability to state seizure and destruction of eleven allegedly obscene books in an *in rem* action brought pusuant to K. S. A. 21-1102c.

On July 24, 1964, the then attorney general of Kansas filed in the court below an information alleging that copies of the books in question were being kept for sale at Rector's Book Store in Wichita; that they were obscene and thus in violation of K. S. A. 21-1102. The information requested that an order be issued to the owners of the books to show cause why a warrant for seizure of these books should not issue. A copy of each book was filed with the information. The same day the judge of division No. 2 of said court entered an order that any person having any interest in said books should appear and show cause why a warrant should not be issued directing the seizure of said books by the sheriff of said county, and setting a hearing thereon on July 31, 1964.

On July 31, 1964, the owners of the book store intervened and moved to (1) quash the information and to dismiss the proceedings, (2) for a jury trial and (3) for a continuance of the hearing on the merits. The first two motions were overruled and the latter was granted. The owners then moved that the judge of division No. 2 disqualify himself in the case because it appeared from the show cause order issued by him

that he had read three of the books and had examined the other eight, and had made a finding "that there is reason to believe that said books are obscene."

This motion was sustained and the case was reassigned to division No. 6 of the same court. Here motions to quash and dismiss and for a jury trial, identical to the previous ones were made and overruled. As a result of pretrial conference the parties entered into certain stipulations including the following:

"1. Agents or representatives of the Attorney General in the month of July, 1964, purchased from open counters or rack displays, where they were offered for sale to the general public, the eleven titles named in the Information, said titles having been filed in this proceeding as Exhibits 'A' through 'K', at Rector's Book Store, 133 North Broadway, Wichita, Kansas.

"2. Francis G. Vater and Joe Rector, Jr. are copartners operating Rector's Book Store, at 133 North Broadway, Wichita, Kansas, and in the course of a year's business in that store handle and offer for sale to the general public large quantities of written and printed publications of all kinds dealing with every conceivable subject; that such written and printed publications are supplied by established publishing houses and comprise daily and weekly newspapers, magazines, books and prints containing material concerning religion, philosophy, science, literature, art, and all subjects relating to ideas and the graphic arts of interest to readers and students of printed words and ideas and graphic arts; that everyone patronizing Rector's Book Store has a free choice in the purchase

of the printed matter for sale at the store; that the proprietors of Rector's Book Store have not read the eleven titles involved in this action and do not read nor presume to read as a matter of course the printed material which is offered for sale in such store."

Trial was had December 10, 1964. The plaintiff introduced into evidence copies of the eleven books and rested. The defendants then moved to dismiss upon the grounds the plaintiff had not sustained its burden of proof. The trial judge took this motion under advisement. The defendant owners then offered the testimony of an associate professor of English at Wichita University, and they also offered into evidence copies of nine different books by well-known authors, concerning which the professor testified, as well as the challenged books. The judge of division No. 6 who heard the above passed away prior to rendition of any decision. By agreement of the parties the case was eventually reassigned to division No. 7 for decision on the record already made. Thereafter the judge of that division entered his memorandum opinion upholding the procedure used but finding that the books were not obscene and denying the requested seizure warrant.

The plaintiff has appealed from such finding and order, and the defendants have cross-appealed from the earlier orders denying their motion to quash and to dismiss and for jury trial.

Plaintiff, referred to hereafter as appellant, asserts the trial court erred as a matter of law in concluding that the questioned books are not obscene within the meaning of K. S. A. 21-1102 and in refusing to issue

a seizure warrant pursuant to K. S. A. 1102c. Defendants, referred to hereafter as appellees, urge that the books are not obscene and are within the protection of the first and fourteenth amendments to the constitution of the United States and section 11 of the bill of rights of the Kansas constitution.

The first amendment to the federal constitution provides in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The fourteenth amendment provides in pertinent part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

And section 11 of our own bill of rights provides:

> "The liberty of the press shall be inviolate: and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right. . . ."

K. S. A. 21-1102 provides in pertinent part:

> "(*a*) Any person who shall . . . sell . . . or distribute any book . . . publication or other thing, containing obscene, immoral, lewd or lascivious language, or obscene . . . descriptions, manifestly tending to the corruption of the morals of persons . . . shall be guilty of a misdemeanor. . . .

"(*b*) The test to be applied in cases under subsection (*a*) of this section shall not be whether sexual desires or sexually improper thoughts would be aroused in those comprising a particular segment of the community, the young, the immature or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called wordly wise and sophisticated, indifferent and unmoved. But such test shall be the effect of the book, picture or other subject to complaint considered as a whole, not upon any particular class, but upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture or other subject of complaint must be judged as a whole in its entire context, not by considering detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged."

K. S. A. 21-1102a provides in part:

"Any person who . . . distributes for resale or for reading . . . any book, magazine or pamphlet, so composed as to constitute a compilation of . . . words, stories . . . featuring and primarily devoted for the purpose of commercial exploitation, to the description or portrayal or suggestion of illicit sex, or sexual relations, of perversion, lust or sexual passion, or to any combination . . . thereof, shall be guilty of a violation of section 1 [21-1102] of this act. . . ."

And K. S. A. 21-1102c establishes a procedure for the issuance of search warrants, and for seizure and

destruction of material found to be in violation of the foregoing statutes.

A leading case on obscenity has been *Roth v. United States,* 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304, decided in 1957. There it was said that obscenity is not within the area of constitutionally protected freedom of speech or press either under the first amendment as to the federal government or under the due process clause of the fourteenth amendment as to the states. The court stated:

> "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (p. 484.)

The court further said:

> ". . . sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest." (p. 487.)

The court quoted approvingly the following definition of obscenity:

> "'A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . .'" (Footnote 20, p. 487.)

And the court established the following test for obscenity:

> ". . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (p. 489.)

Thereafter this court had before it the subject of obscenity in *State v. A Quantity of Copies of Books,* 191 Kan. 13, 379 P. 2d 254, decided March 2, 1963, (reversed on procedural grounds in *A Quantity of Books v. Kansas,* 378 U. S. 205, 12 L. ed. 2d 809, 84 S. Ct. 1723, decided June 22, 1964). The thirty-one books there involved were held to be obscene within the *Roth* definition.

Next we need notice *Jacobellis v. Ohio,* 378 U. S. 184, 12 L. ed 2d 793, 84 S. Ct. 1676, decided June 22, 1964. The court specifically adhered to its obscenity test announced in *Roth* and further stated:

> "We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance,' and that 'the portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Id.,* at 484, 487. It follows that material dealing with sex in a manner that advocates ideas, *Kingsley Int'l Pictures Corp. v. Regents,* 360 U. S. 684, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance. See *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, 920, 383 P. 2d 152, 165, 31 Cal. Rptr. 800, 813 (1963). It should also be recognized that the *Roth* standard

> requires in the first instance a finding that the material 'goes substantially beyond customary limits of candor in description or representation of such matters.'" (p. 191.)

Additionally, the court stated that the "contemporary community standards" aspect of the *Roth* test is to be determined on the basis of a national standard rather than those of the particular local community from which the case arose.

Standards for governmental control of obscenity were further consolidated in *Memoirs v. Massachusetts,* 383 U. S. 413, 16 L. ed. 2d 1, 86 S. Ct. 975 (the Fanny Hill book), decided March 21, 1966, with the result it can now be said that each of the following elements must independently be satisfied before a book can be held obscene: (1) The dominant theme of the material taken as a whole appeals to a prurient sexual interest of the average person; (2) the material is patently offensive because it affronts contemporary community standards relating to the description of sexual matters; and (3) the material is utterly without redeeming social value. And in the same case as well as in two others decided the same day (*Ginzburg v. United States,* 383 U. S. 463, 16 L. ed. 2d 31, 86 S. Ct. 969; and *Mishkin v. New York,* 383 U. S. 502, 16 L. ed. 2d 56, 86 S. Ct. 958) there seems to be emerging the principle that in close cases of obscenity the so-called "packaging" or advertising of material is relevant and may be considered as a part of the content of the material itself where that packaging or promotion indicates exploitation entirely on the basis of prurient appeal.

Preliminary to application of the foregoing to the case at bar, we should note the scope of our review.

Appellees urge that it should be limited to determining only whether the ruling below is supported by sufficient evidence. We do not agree. In *Jacobellis*, where there had been a finding of obscenity in a questioned film in the court below, the court was asked to make this same approach. It was rejected after considerable discussion, and citation of authority, the court stating:

> ". . . we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." (p. 190.)

We think that view sound. (See, also, cases cited at anno. 5 A. L. R. 3d 1158, 1191-1193.) Constitutional judgments are for ultimate decision of this court; here the entire record will be reviewed independently as to constitutional protection to be afforded the questioned material. We have no problem of weighing conflicting evidence upon disputed questions of fact.

As to the eleven books we conclude that the dominant theme of the material taken as a whole appeals to a prurient sexual interest of the average person and that the material is patently offensive because it goes beyond and affronts contemporary community standards relating to the description of sexual matters. In reaching this conclusion we have considered, and not overlooked, the evidence offered by appellees. We do not deem it necessary to set forth in any detail the contents of the books. Their titles are appended hereto together with the descriptive blurbs or subtitles immediately preceding them on the covers. These give more than a hint of the nature of the contents. For all in-

tents and purposes the books are indistinguishable from those found to be "hard core pornography" by this court in *State v. A Quantity of Copies of Books, supra.* Suffice it to say the eleven books here considered relate, to the exclusion of anything else, the illicit sexual capers of the principal figures, running the gamut in drawn out episodic form, chapter by chapter, of feats of sexual prowess and perversion in one form or another. Each is nothing more than a series of vulgar caricatures, patently offensive, with no appeal of any kind except to the prurient.

We have little difficulty in concluding this material, weighed separately from the foregoing, is utterly without redeeming social importance. The word "redeeming" is a somewhat elusive term difficult to lay hold of firmly. Webster's Third New International Dictionary defines it as "serving to offset or compensate for a defect." The term implies something of merit of value. None of these books makes any effort at characterization or insight into human nature, no attempt is made to portray reality, no ideas are presented, no story is told, nothing is said to advance human knowledge or understanding in science, literature or art. Further negations could be made. It is not that the books lack literary merit—which they do—they simply lack any redemptive feature of social value or importance.

If the obscene nature of these books be deemed doubtful, that doubt would certainly have to be resolved against them when we consider their packaging in the light of the positive judgments in *Ginsburg* and *Mishkin,* and in the warning in *Memoirs,* that,

> ". . . the circumstances of production, sale, and publicity are relevant in determining whether or

not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. It is not that in such a setting the social value test is relaxed so as to dispense with the requirement that a book be *utterly* devoid of social value, but rather that, as we elaborate in *Ginzburg v. United States, post,* pp. 470-473, where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value." (p. 420.)

In *Mishkin* the defendant publisher was prosecuted for violation of state obscenity statutes including one for possession of obscene books with intent to sell similar to our own. In affirming his conviction, the court included this description of the books:

"Fifty books are involved in this case. They portray sexuality in many guises. Some depict relatively normal heterosexual relations, but more depict such deviations as sado-masochism, fetishism, and homosexuality. Many have covers with drawings of scantily clad women being whipped, beaten, tortured, or abused. Many, if not most, are photo-offsets of typewritten books written and illustrated by authors and artists according to detailed instructions given by the appellant. Typical of appellant's instructions was that related by one author who testified that appellant insisted that the books be 'full of sex scenes and lesbian scenes. . . . [T]he sex had to be very strong, it had to

> be rough, it had to be clearly spelled out. . . . I had to write sex very bluntly, make the sex scenes very strong. . . . [T]he sex scenes had to be unusual sex scenes between men and women, and women and women, and men and men. . . . [H]e wanted scenes in which women were making love with women. . . . [H]e wanted sex scenes . . . in which there were lesbian scenes. He didn't call it lesbian, but he described women making love to women and men' . . . making love to men, and there were spankings and scenes—sex in an abnormal and irregular fashion.' . . . Artists testified in similar vein as to appellant's instructions regarding illustrations and covers for the books." (p. 505.)

The writer of the foregoing could well have been discussing the eleven books in the instant case, as reflected by the lurid illustrated covers as well as the printed pages. Additionally each of the eleven contains a frontispiece paragraph and one on the back cover blatantly pointing up the strong sex. No other appeal is made. The format is the same in all the books—paperback—obviously mass produced, exactly 190 pages in length, strong sex and perversion with repetitive regularity in each chapter, literally appealing to pruriency from cover to cover.

In *Ginzburg*, a prosecution for violation of federal laws prohibiting the mailing of obscene matter, the court discussed evidence of the methods of advertising the challenged publications, and commented thereon as follows:

> "This evidence, in our view, was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all

ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. [p. 470]

. . .

"We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test. . . ." (p. 474.)

The packaging simply evidences the publisher's estimate of what his products really are, and this is acceptable evidence. Here that packaging strongly emphasizes the prurient interest as well as affrontry to accepted standards in sexual matters, and it just as strongly belies any redeeming social value. We recognize the intervenors are not the publishers and are not

on trial; it is the books which are on trial. They brazenly proclaim the motive in their creation and exploitation.

In due deference to the judge in the court below who gave extended consideration to this case it should be noted the last three decisions mentioned above were announced by the Supreme Court of the United States after his judgment herein.

Appellees rely heavily on the fact the nine books offered into evidence by them, some being best sellers and in wide circulation in this country, contain vivid sexual depictions as well as liberal use of what has come to be denoted "four letter" Anglo-Saxon words (the latter being absent in the eleven questioned books). They argue the eleven are less offensive. Without laboring the proposition it can hardly be denied that these nine books could be considered to have some redeeming social values to compensate for the strong sex, and this is a distinguishing feature. This court, therefore, determines that the eleven books are obscene and may not be lawfully offered for sale, and hence are subject to seizure under K. S. A. 21-1102c.

By way of cross-appeal appellees raise substantially three questions. They say the statutes under which this proceeding was brought are unconstitutionally vague and indefinite. We have heretofore quoted K. S. A. 21-1102, 21-1102a and 21-1102c which are to be construed together. Exactly the same attack was made in *State v. A Quantity of Copies of Books, supra,* and answered adversely to appellees' contentions by this court when it stated: "We believe that the test for obscenity which is provided is adequate. . . ." (p. 15.)

The standards of obscenity contained in our statutes are within permissible constitutional limits.

Appellees' second contention, that they were wrongfully denied a jury trial, was likewise answered adversely in *State v. A Quantity of Copies of Books,* supra. There this court pointed out that this type of action is a civil action growing out of statute in which there is no right to a jury trial, none having existed at common law. We see no reason to depart from the principles announced in the foregoing.

Finally, appellees contend that inasmuch as K. S. A. 21-1102c does not specifically provide for an adversary hearing on the question of obscenity of the material before a search warrant is issued, this necessary procedural element may not be supplied with the result that K. S. A. 21-1102c lacks due process and may not lawfully be used.

An adversary hearing was provided in this case, as heretofore stated. To understand better what is involved here the reader should recall that the decision of this court in *State v. A Quantity of Copies of Books,* supra, was reversed by the Supreme Court of the United States on the basis that the procedure followed did not meet constitutional standards required by the due process clause of the fourteenth amendment. The question of obscenity of the material was not reached. The procedural deficiency, as determined by four members of that court, was that there was no adversary hearing on the question of obscenity of the books prior to seizure thereof. Because two other members of the court thought that the first amendment does not permit any suppression of obscenity whatsoever, the decision of this court was reversed (*A Quantity of Books v. Kansas,* 378 U. S. 205, 12 L. ed. 2d 809, 84 S. Ct. 1723).

In instituting this proceeding the state requested an order, which was granted, directed to the owners of the books to show cause why a warrant for seizure of the books should not issue. There was no seizure warrant issued at the time the proceeding was started and since the trial court found after the adversary hearing that the books were not obscene no warrant has ever been issued. There has been no repression or restraint of the books at any time. Not a single copy of any book was ever seized. The copies used as exhibits were purchased at retail. We think constitutional safeguards have been supplied and not improperly so. In reality appellees are objecting to being given an adversary hearing as a part of due process, not because it injures them but because without it the state would be powerless to enforce the statute.

The concept of providing a hearing to conform a statute to the constitutional requirements of due process is not novel. Our habitual criminal act (K. S. A. 21-107a) has never expressly provided for a hearing on the question of prior felony convictions. Nevertheless this court has held that the requirements of due process include the right to such a hearing and that it therefore must be made available under that statute (see *Levell v. Simpson,* 142 Kan. 892, 52 P. 2d 372). In *Cities Service Gas Co. v. State Corporation Commission,* 192 Kan. 707, 391 P. 2d 74, we find this:

> "... this court has recognized the rule that where no express provision for notice is made in the statute, if there be nothing in the statute which prevents notice from being given, the requirement of reasonable notice will be implied. [Citations]" (p. 713.)

In view of the foregoing, upon cross-appeal the orders of the trial court overruling the motion to quash and dismiss and denying a jury trial are affirmed. Upon appeal, its judgment that the eleven books are not obscene is reversed with directions for further proceedings in harmony with this opinion.

APPROVED BY THE COURT.

APPENDIX

(State's exhibits "A" through "K".)

Lost in Lust She Became A Passion Addict. SIN HOOKED.

Wanton Passion Was the Secret of These— BAYOU SINNERS.

Wild Passions Bought Them Shame and Pain! LUST HUNGRY.

He worked Bodies of Marble and Sin in his SHAME SHOP.

Her Body Was the Ticket to a Shame Career! FLESHPOT.

Her Act was a Fake but her Lust Secrets Real! SINNERS SEANCE.

In a Sin Jungle of Voodoo Lust She was the— PASSION PRIESTESS.

They Lived Their Twisted Life of Lust as—PENTHOUSE PAGANS.

Twisted Hungers were Placed on Sale in this— SHAME MARKET.

In a Passion Camp of Lust He Ruled as — SIN WARDEN.

Passion Drove Him on a Lust Hunt to Vengeance! FLESH AVENGER.

APPENDIX C.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The provisions of the Fourth Amendment to the United States Constitution are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The provisions of the Seventh Amendment to the United States Constitution are:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

4. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. The provisions of the general statutes of Kansas [G. S. 1961 Supp., §21-1102; L. 1961, ch. 186, §1; June 30] are:

"(a) Any person who shall import, print, publish, sell, design, prepare, loan, give away or distribute any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, manifestly tending to the corruption of the morals of persons, or shall introduce into any family, school or place of education or shall buy, procure, receive or have in his possession, any such book, pamphlet, magazine, newspaper, writing, ballad, printed paper, print, picture, drawing photograph, publication or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five (5) nor more than three hundred dollars ($300), or be imprisoned not to exceed thirty (30) days, or both.

"(b) The test to be applied in cases under subsection (a) of this section shall not be whether sexual desires or sexually improper thoughts would be aroused in those comprising a particular segment of the community, the young, the immature or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated, indifferent and unmoved. But such test shall be the effect of the book, picture or other subject to complaint consid-

ered as a whole, not upon any particular class, but upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture or other subject of complaint must be judged as a whole in its entire context, not by considering detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged."

6. The provisions of the general statutes of Kansas [G.S. 1961 Supp. §21-1102a; L. 1961, ch. 186, §2; June 30] are:

"Any person who publishes or distributes for resale or for reading or other perusal any book, magazine or pamphlet, so composed as to constitute a compilation of pictures, illustrations, caricatures, cartoons, words, stories and advertisements, or any combination or combinations thereof, featuring and primarily devoted for the purpose of commercial exploitation, to the description or portrayal or suggestion of illicit sex, or sexual relations, of perversion, lust or sexual passion, or to any combination or combinations thereof, shall be guilty of a violation of section 1 [21-1102] of this act and punished as therein provided."

7. The provisions of the general statutes of Kansas [G. S. 1961 Supp. §21-1102c; L. 1961, ch. 186, §4; June 30] are:

"Whenever any district, county, common pleas, or city court judge or justice of the peace shall receive an information or complaint, signed and verified upon information and belief by the county attorney or the attorney general, stating there is

any prohibited lewd, lascivious or obscene book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, motion pictures, drawing, photograph, publication or other thing, as set out in section 1 [21-1102] (a) of this act, located within his county, it shall be the duty of such judge to forthwith issue his search warrant directed to the sheriff or any other duly constituted peace officer to seize and bring before said judge or justice such a prohibited item or items. Any peace officer seizing such item or items as hereinbefore described shall leave a copy of such warrant with any manager, servant, employee or other person appearing or acting in the capacity of exercising any control over the premises where such item or items are found or, if no person is there found, such warrant may be posted by said peace officer in a conspicuous place upon the premises where found and said warrant shall serve as notice to all interested persons of a hearing to be had at a time not less than ten (10) days after such seizure. At such hearing, the judge or justice issuing the warrant shall determine whether or not the item or items so seized and brought before him pursuant to said warrant were kept upon the premises where found in violation of any of the provisions of this act. If he shall so find, he shall order such item or items to be destroyed by the sheriff or any duly constituted peace officer by burning or otherwise, at such time as such judge shall order, and satisfactory return thereof made to him: *Provided, however,* Such item or items shall not be destroyed so long as they may be needed as evidence in any criminal prosecution."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 865

A QUANTITY OF COPIES OF BOOKS, FRANCIS G. VATER AND JOE RECTOR, JR., Co-Partners, d/b/a RECTOR'S BOOK STORE, WICHITA, KANSAS,
Petitioners,

vs.

STATE OF KANSAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The opinion of the Supreme Court of Kansas, holding the paperback booklets here involved to be obscene, and reversing the trial court, is reported at 197 Kan. 306, 416 P.2d 703, and appears in the record beginning at page 43. The trial court's opinion is unreported, but appears in the record beginning at page 29

JURISDICTION

The petitioners seek to have this Court accept jurisdiction under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Are these paperback booklets obscene and therefore not protected by the First and Fourteenth Amendments?

2. Should an appellate court in an obscenity case review the questioned material and determine independently whether or not it is constitutionally protected?

3. May a state, in a civil case, provide for seizure of material found to be obscene after an adversary proceeding, without providing a jury trial of right?

4. Does K.S.A. 21-1102, as construed by the Kansas Supreme Court, contain a definition of obscenity which is consistent with the First and Fourteenth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States, and Kansas Statutes Annotated 21-1102, 21-1102(a) and 21-1102(c) are all set out in Appendix C of the Petition for Certiorari.

STATEMENT OF FACTS

On July 24, 1964, the Attorney General of Kansas filed wih the District Court of Sedgwick County, Kansas, an information alleging that copies of 11 paperback booklets were being kept for sale at Rector's Book Store in Wichita, Kansas, and that they were obscene and thus in violation of K.S.A. 21-1102. The information requested an order to the owners to show cause why a warrant for seizure of these booklets should not issue. A copy of each booklet was filed with the information. (R. 3-4). Sum-

maries of these booklets are printed in an appendix to this brief.

An order to show cause was issued the same day by Judge Howard C. Kline, setting a hearing for July 31, 1964. The order recited that the judge had fully read three of the booklets and had examined the eight others, and that there was reason to believe they were obscene. (R. 4).

On July 31, 1964, the owners of Rector's Book Store, Francis G. Vater and Joe Rector, Jr., petitioners herein, appeared by counsel and moved (1) to quash the information and to dismiss the proceedings, (2) for jury trial, and (3) for a continuance of the hearing on the merits. The court overruled the first two motions, but granted a continuance to September 22, 1964. (R. 5-8).

Thereafter the owners moved that Judge Kline disqualify himself, on the ground that he had prejudged the case by reading the booklets and determining that they were obscene. On August 20, 1964, Judge Kline granted this motion, ordered the case transferred to another division, and vacated the order setting the hearing for September 22. (R. 8-9).

The case was reassigned to Judge E. E. Sattgast, and on September 18, 1964, motions to quash and dismiss and for jury trial, identical to those previously made, were overruled by him. (R. 9-10).

After a pre-trial conference, a pre-trial order was entered, in which the parties stipulated that copies of the 11 booklets were purchased by agents of the Attorney General in July, 1964, that the owners had not read these titles, and that they do not as a matter of course read the wide variety of printed material sold by them. (R. 10-11).

When the case was heard on December 10, 1964, the State introduced copies of the 11 titles (plaintiff's exhibits A through K) and rested. The defense then moved to dismiss on the ground that the State had not introduced evidence of community standards and hence had failed to sustain its burden of proof. The court took this motion under advisement. (R. 17-23). The defense introduced copies of nine books by well-known authors (defendants' exhibits 1, 2, and 4 through 10), as well as the testimony of Robert B. Cutler, Associate Professor of English at Wichita State University, to show that the community standards were not transgressed by the 11 booklets named in the information. (R. 14-27).

Upon the death of Judge Stattgast before he had rendered a decision, the case was reassigned to Judge Tom Raum. It was stipulated by the parties that the case could be decided by him on the record already made. (R. 28-29).

On July 9, 1965, Judge Raum filed his memorandum opinion, finding that the books named in the information were not obscene and refusing to issue a search warrant. (R. 29-36). The State appealed to the Supreme Court of Kansas from this finding, and the defense cross-appealed from the earlier orders denying its motion to quash and dismiss and for jury trial. (R. 37-38).

The Supreme Court found the booklets to be obscene and reversed the trial court on this point, while affirming the order refusing to quash and dismiss and the order denying jury trial. (R. 43-65). Rehearing was denied. (R. 83). The mandate of the Kansas Supreme Court has been stayed pending disposition of the petition for writ of certiorari.

ARGUMENT

I.

These Booklets Are Obscene, and Are So Characterized by Their Packaging.

These booklets meet every test for obscenity announced by this Court. When their contents and packaging are considered together, it is apparent that they are designed and sold solely as part of the "sordid business of pandering."

What we have here is not literature or speech, but a business. In times past this industry has operated largely in a surreptitious manner. Today, however, as evidenced by the booklets in this case, it has begun to come out of the back alleys and onto the legitimate newsstands. In an effort to avoid the legal prohibitions against their ancient product, the purveyors have packaged it as a paperback book. They have omitted some of the four-letter words, and they have inserted a semblance of a plot. However, all the usual attributes of surreptitious obscenity are retained; and the publisher's sole purpose is to exploit an interest in titillation by pornography.

This Court held last term in *Ginzburg* v. *United States*, 383 U.S. 463 (1966), that: "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity." Here the seller's characterization of his product is boldly advertised on the covers and flyleaves of these booklets. Each cover pictures a scantily-clad woman in an obviously provocative pose. Each title carries definite sexual implications. At the top of each cover

there appears some titillating line, such as "Passion drove him on a lust hunt to vengeance!". The back cover features a short advertisement of the prurient contents; so does the front flyleaf. Even the brand names printed on the fronts have been chosen with titillation in mind (e.g., Idle Hour, Sundown, Ember). The "leer of the sensualist" permeates this advertising just as surely as it did in the *Ginzburg* case. Since it follows these booklets wherever they are sold, it should be decisive in determining the question of their obscenity. *Books, Inc.* v. *United States*, 358 F.2d 935 (1st Cir. 1966), *petition for cert. filed*, 35 U.S.L. Week 3075 (U.S. July 8, 1966) (No. 323).

Nor do the contents of these booklets fail to live up to their advertising. The prurient appeal of their dominant theme will hardly disappoint the buyer whose interest in titillation has been aroused by their covers. All of them are divorced from reality and their main function is to nourish erotic fantasies in the reader's mind. They are marked by a daydream quality, which two leading scholars have said is a chief characteristic of obscenity. Lockhart and McClure, *Obscenity Censorship*, 7 Utah L. Rev. 289 (1961). The erotic scenes required for these fantasies recur regularly throughout the book, without distracting character development or philosophical discussion. This, too, is a major characteristic of obscenity. Kronhausen and Kronhausen, *Pornography and the Law*, p. 178 (Ballantine, 1959). As may be seen from summaries contained in the appendix to this brief, the booklets in this case possess most of the other attributes of obscene literature noted by the Kronhausens in their book (pp. 195-244):

(1) The women are as anxious to be seduced as the men are to seduce them.

(2) The females are generally of the nymphomaniac type. They are almost invariably beautiful of face and possess overdeveloped figures. They have no concern whatsoever about pregnancy. There is no trace of modesty or remorse, or fear of venereal disease, and love is almost never mentioned.

(3) Defloration is coupled with rape and sadism. The female is generally desirous of the act and obtains exotic enjoyment despite the pain. There is seldom any hostility on the part of the female who has been raped.

(4) The males are generally supersexed.

(5) Lesbianism is common, since it is assumed to have an erotic effect on the predominantly male audience.

(6) Violence and flagellation are common, almost invariably perpetrated on the females.

(7) Sexual orgies involving several persons of both sexes are common.

(8) Cunnilingus and fellatio occur, as does sodomy per anus. Incest is also present.

This erotic material has been hung on an extremely rudimentary plot; and the whole has been mass-produced by an industry based on the "commercial exploitation of the morbid and shameful craving" for such materials. *Roth* v. *United States*, 354 U.S. 476, 496 (1957) (concurring opinion of Warren, C.J.).

These booklets bear a striking resemblance to the paperback books found to be obscene in *Mishkin* v. *New York*, 383 U.S. 502 (1966). Like those in *Mishkin*, these booklets have a standardized format and a repetitive quality to their sequences. The prices printed on the covers

are exorbitant. They are cheaply prepared and in massive numbers, as may be seen from the long lists of similar books which they contain. The character of their material is transparent. They depict sexual deviations, such as sadism, masochism, fetishism and homosexuality. Many of the covers show women being abused. In sum, it is apparent that Mishkin was in the same business as the publishers of the booklets now before the Court.

Although this Court's discussion in *Mishkin* of the nature of the material is devoted primarily to the prurient-appeal question, it seems implicit in the decision that such paperback pornography also satisfies the requirements outlined in *Memoirs of a Woman of Pleasure* v. *Attorney General*, 383 U.S. 413 (1966) (opinion of Brennan, J.), i.e., that obscene material be patently offensive to contemporary community standards and that it be utterly without redeeming social value. The booklets here involved clearly satisfy both these tests.

Patent offensiveness, it has been said, is that characteristic of indecency which is the basis of society's objection to obscene material. *State* v. *Hudson County News Co.*, 41 N.J. 247, 196 A.2d 225 (1963). Certainly the descriptions in these booklets of group orgies, cunnilingus, fellatio, sodomy, sadism, masochism and rape are patently offensive to contemporary standards of decency. Their offensiveness is reinforced by the prominent display given these descriptions on the covers and flyleaves. *Cf. Ginzburg* v. *United States.*

Nor is there any redeeming social value to be found in these paperback booklets. They are devoted exclusively to sexual fantasy, sadism and perversion. As the court below noted, "None of these books makes any effort at characterization or insight into human nature, no attempt

is made to portray reality, no ideas are presented, no story is told, nothing is said to advance human knowledge or understanding in science, literature or art". The best that petitioner's own expert witness could muster with regard to their social value was that they may be read easily by persons of limited and unsophisticated background who have an interest in erotic experience. (R. 34-35). But this is merely to say that their prurient appeal is designed for persons of limited education. It does not establish that they have social importance. Furthermore, "evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance". *Memoirs of a Woman of Pleasure* v. *Attorney General* (Separate opinion of Brennan, J.). The packaging of these booklets demonstrates overwhelmingly that they are merely pawns in the commercial exploitation of a prurient interest in sex. As such, they have no importance whatsoever to society.

II.

This Court and the Court Below Are Entitled to Determine for Themselves Whether These Booklets Are Obscene.

Petitioners suggest that because the record contains so-called "expert" testimony that these booklets are not obscene, and because the state trial court agreed with this testimony, this Court and the Supreme Court of Kansas have no choice but to find them obscene also.

However, their suggestion completely disregards the well-established principle that in obscenity cases this Court and other appellate courts must review the questioned material and independently determine whether or not it is obscene. This Court recently reaffirmed the principle in *Ginzburg* v. *United States*, 383 U.S. 463 (1966). The

Court's opinion states that, "In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question." This practice is required because the question of obscenity is a federal constitutional question; and as such it must ultimately be decided by the Court on appeal. The reasoning and authorities supporting this view are thoroughly reviewed in *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964) (opinion of Brennan, J.). Decisions of lower federal and state courts are overwhelmingly in accord. See the cases collected in Annot., 5 A.L.R. 3rd 1158, 1191 (1966).

The court below followed this view, stating: "Constitutional judgments are for ultimate decision of this Court; here the entire record will be reviewed independently as to constitutional protection to be afforded the questioned material. We have no problem of weighing conflicting evidence upon disputed questions of fact" (R. 54). That court, following what it took to be its constitutional duty, examined the eleven paperback booklets here involved, as well as the comparison evidence and "expert" testimony of petitioners, and concluded that they are obscene and hence not protected. In this it was correct

The appellate courts cannot be bound, as petitioners wish, by the opinion of Professor Cutler that the paperbacks here in question are not constitutionally obscene. That question is a judicial one, and its resolution may not be delegated to a critic and teacher of literature, as petitioners demand. This Court and the Supreme Court of Kansas are entitled to disagree with Professor Cutler's opinions, if an examination of the booklets themselves shows them to be obscene.

These booklets are the best evidence of their own character. They are "sufficient in themselves for the determination of the question" of their obscenity. *Ginzburg* v. *United States, supra.* For this reason, evidence extrinsic to the challenged materials, such as that introduced in this case, although it may assist in determining their obscenity, cannot bind a reviewing court on the ultimate constitutional question. For the same reason it is absurd to suggest, as petitioners do in their brief, that the charge of obscenity made here is totally devoid of evidentiary support in the record. *Cf. Thompson* v. *Louisville,* 362 U.S. 199 (1960).

Recognizing that this Court does exercise its indedependent constitutional judgment in obscenity cases, petitioners suggest that the State Supreme Court had no right to make such a determination here because the trial court's ruling was in their favor. (Petition, pp. 35-37). Although petitioners are afforded full appellate review of a decision against them, they argue that the State should not have this opportunity. Such a notion in a civil case smacks of one-sided justice. The State should have the same right to appellate review in its Supreme Court as the petitioners have. Their suggestion would not only be unfair to the public, but it would prevent uniform application of state obscenity statutes and federal constitutional principles within the state. Furthermore, the scope of review to be exercised by state appellate courts in obscenity cases should be left to those courts. Certainly no federal right of these petitioners was abridged by the Kansas Supreme Court's independent determination of their claim that these booklets are constitutionally protected.

III.

No Jury Trial Was Required on the Question of Community Standards.

Petitioners' argument that they have a right to jury trial in this civil proceeding is based on the erroneous premise that only a jury is competent to decide the extent of community toleration. If judges could not constitutionally decide this question as well as juries, then appellate judges would be incapable of exercising the independent constitutional judgment necessary for a review of the question of obscenity. *Cf. Jacobellis* v. *Ohio*, 378 U.S. 184 (1964) (Opinion of Brennan, J.). As a constitutional question, community toleration must ultimately be decided by the court on appeal. This being true, it simply cannot be said that judges are incompetent to determine the extent of that toleration. Presumably this Court makes such a determination in reviewing material claimed to be obscene. See, e.g., *Mishkin* v. *New York*, 383 U.S. 502 (1966); *Times Film Corp.* v. *Chicago*, 355 U.S. 35 (1957); *Mounce* v. *United States*, 355 U.S. 180 (1957); *One, Inc.* v. *Oleson*, 355 U.S. 371 (1957); *Sunshine Book Corp.* v. *Summerfield*, 355 U.S. 372 (1957). Both parties in the case at bar argue the question of obscenity on the assumption that this Court is competent to decide community standards. Petitioners' argument for a jury trial of right in obscenity cases is fundamentally inconsistent with the established principles of judicial review in such cases. While a judge is not necessarily superior to a jury in an obscenity case, the choice between them is one of policy, to be made by the state. The First Amendment cannot be said to render either one incompetent to decide the question. In this connection it should be pointed out that *Fay* v. *New York*, 332 U.S. 261, 288 (1947), and *Palko* v. *Connecticut*, 302 U.S. 319, 324 (1937), hold that the Sixth, Seventh and Fourteenth Amendments do not require the states to provide for trial by jury.

IV.

The Definition of Obscenity in the Kansas Statute Is Not Unconstitutionally Broad or Vague.

Petitioners complain that the definition of obscenity contained in K.S.A. 21-1102 is unconstitutionally vague. However, it is undeniable that the Supreme Court of Kansas, in applying this statute to the present booklets, considered itself controlled by all the proper constitutional standards. It is apparent from the court's opinion that it considered the statutory definition of obscenity to be synonymous with the standards announced by this Court for judging constitutionally suppressible obscenity. This may be seen from the Court's statement as follows:

> It can now be said that each of the following elements must independently be satisfied before a book can be held obscene: (1) the dominant theme of the material taken as a whole appeals to a prurient sexual interest of the average person; (2) the material is patently offensive because it affronts contemporary community standards relating to the description of sexual matters; and (3) the material is utterly without redeeming social value. (R. 53).

It should also be noted that the statutory language about which petitioners complain is found in subsection (a) of K.S.A. 21-1102. This language is limited by subsection (b) of that statute, which contains a codification of the *Roth* standard.

Both the language of the statute and the opinion of the court below restrict the definition of obscenity contained in K.S.A. 21-1102 to the standards previously announced by this Court. The *Roth* decision itself holds squarely against petitioners' claim that these standards do not provide reasonably ascertainable standards. *Cf. Mishkin* v. *New York*, 383 U.S. 502 (1966).

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Summary of State's Exhibits

Ex. A. "Sin Hooked," by William Kane (Leisure).

Happily married salesman discovers his former wife, assumed dead, to be very much alive. He doubles his pleasure by commuting from one wife to the other.

Intercourse—14-16, 98-100, 110-113, 163, 175-176.

Rear entry intercourse—36-37.

Fellatio—18, 163.

Sadism—51-53, 134-135.

Public display of sadism, transvestism, homosexuality, fellatio, sodomy—51-56.

Public display of adultery and homesexuality—171-178.

Ex. B. "Bayou Sinners," by J. X. Williams (Idle Hour).

Virile insurance investigator leaves local prostitute in search of rich policy holder, finds him in jungle orgy, rescues him and returns.

Nude prostitute—6, 9-10.

Intercourse with prostitute—11-14, 33-35.

Fellatio—59.

Mother has intercourse with drugged hero while her daughter observes—55-61.

Daughter changes place with mother—61-62.

Defloration—84-92.

Sadistic, interracial orgy with whipping, fellatio—118-144.

Lesbianism—159.

Intercourse between two men and one woman—167-170.

Ex. C. "Lust Hungry," by John Dexter (Leisure).

Accountant becomes involved with the boss's wife, who blackmails him with pictures of love scenes in order to retain his services.

Intercourse—5-10, 26-32, 51-53, 59-63, 136-142.

Three day orgy with one man and two women—74-81.

Lesbianism—76-78.

Sodomy per anus—88, 140.

Fellatio—156.

Ex. D. "Shame Shop," by Dean Hudson (Sundown).

Lusty sculptor introduces small midwestern college town to the earthier pleasures.

Intercourse and foreplay—31-33, 54-56, 78-84, 99-108, 127-130, 144-147, 178-180; two couples—40-47.

Strip Tease—65-70.

Fellatio and cunnilingus—105-106.

Ex. E. "Fleshpot," by Dean Hudson (Idle Hours).

Carhop sleeps her way to fame as a movie star, but learns to prefer women to men.

Intercourse—30-37, 81-86, 88, 97, 100-102, 117-118, 125-126, 129-130, 142, 146-153, 174-177.

Fellatio and cunnilingus—85.

Lesbianism—130-132, 189-190.

Ex. F. "Sinners Seance," by John Dexter

(Evening Reader).

Gloria Jean who is half of a fake mind-reading act, deserts her partner for a better lover and together they seek to swindle a young millionaire.

Intercourse and foreplay—31-36, 55-66, 72-74, 110-114, 141-144, 181-184.

Fellatio—63, 161-163.

Fellatio and cunnilingus—111-112.

Cunnilingus—165.

Ex. G. "Passion Priestess," by William Kane

(Evening Reader).

Writer searching for his mentor in the Caribbean finds instead a series of lusty women and a voodoo sex ritual.

Two lesbians have intercourse with a man—132.

Voodoo orgy—166-167, 172-180.

Lesbianism—130-131, 170.

Perversion inspired by aphrodisiac—104-105.

Ex. H. "Penthouse Pagans," by John Dexter

(Sundown Reader).

A private eye, searching for a runaway movie starlet, discovers willing women all along the way.

Fellatio and cunnilingus—42-3, 64-5.

Intercourse—40-44, 64-65, 67-68, 113-114.

Fellatio—67.